IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

UNITED STATES OF AMERICA, and
STATE OF COLORADO, *ex rel*. John W. Suthers, Attorney General,

Plaintiffs,

v.

BELLA HOMES, LLC, a Delaware limited liability company,
MARK STEPHEN DIAMOND, an individual,
DANIEL DAVID DELPIANO, an individual,
MICHAEL TERRELL, an individual, and **RESTRICTED – LEVEL 2**
DAVID DELPIANO, an individual,

Defendants,

LAURA C. TABRIZIPOUR, an individual,

Relief-Defendant.

PLAINTIFFS' EX PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION WITH ASSET FREEZE

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Plaintiffs, the United States of America, by United States Attorney John F. Walsh, and the State of Colorado, upon relation of John W. Suthers, Attorney General of Colorado, through undersigned counsel, respectfully request that the Court issue an *ex parte* temporary restraining order and preliminary injunction to protect the public by stopping Defendants' ongoing fraud and preventing the dissipation of the proceeds of the fraud.

INTRODUCTION

As set forth in the Complaint and the attached declarations, Defendants Bella Homes, LLC, Mark S. Diamond, Daniel D. Delpiano, Michael Terrell, and David Delpiano ("Defendants") are engaged in an ongoing foreclosure-rescue scheme to defraud distressed homeowners nationwide through the operation of Bella Homes, LLC ("Bella Homes"). Bella Homes claims to be a company "committed to helping homeowners remain in their homes and secure them for long time use." *See* http://bellahomesllc.net/ (viewed on January 10, 2012). As set forth more fully in the Complaint and below, rather than helping homeowners remain in their homes as promised, Bella Homes instead preys upon distressed homeowners and dupes them into paying thousands of dollars to Bella Homes in reliance upon false promises and false representations, while Bella Homes provides no meaningful assistance to prevent foreclosure or to allow homeowners to remain in their homes. (Complaint at ¶¶ 9-11). In the past twenty-one months, Bella Homes has fraudulently taken approximately $3,000,000 from over 450 homeowners across the nation, and fraudulently taken title to their homes. (*Id*. at ¶ 5). Bella Homes is rapidly expanding its fraud: it has defrauded homeowners from more than $1,000,000 in the last two months of 2011 alone. (*Id*.).

Bella Homes was created at the direction of Defendant Daniel Delpiano for the sole purpose of perpetrating this fraudulent scheme. (*Id*. at ¶¶ 23, 160). Daniel Delpiano has a

criminal history of fraud, including mail fraud, wire fraud, money laundering, mortgage fraud, and racketeering convictions in federal and state courts. (*Id*. at ¶ 24). Bella Homes' entire operation is predicated on fraud and serves no legitimate purpose except to enrich the individual Defendants at the expense of distressed homeowners. (*Id*. at ¶ 160).

The United States invokes the Fraud Injunction Statute, 18 U.S.C. § 1345, to request a temporary restraining order and preliminary injunction to stop Defendants' ongoing fraud and to freeze assets. By engaging in the fraudulent scheme, Defendants are violating the mail and wire fraud statutes. The Fraud Injunction Statute authorizes the United States to commence a civil action in any federal court to enjoin persons who are violating, or about to violate, the substantive provisions of, among others, the mail fraud statute and the wire fraud statute. *See* 18 U.S.C. § 1345(a). Where, as here, an injunction is sought, section 1345 provides that a district court "may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought," and "prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of" any of the fraud-tainted proceeds, or property of equivalent value. 18 U.S.C. §§ 1345(b), (a)(2). The United States meets its burden under section 1345 because Defendants are engaged, or about to engage, in mail fraud, wire fraud, or violations of other enumerated predicate acts.

The State of Colorado invokes for injunctive relief the federal Mortgage Assistance Relief Services Rule (MARS Rule), 16 C.F.R. Part 322, which became effective on December 29, 2010, except the ban on advance fees, effective January 31, 2011. The MARS Rule "[p]rohibits providers of such mortgage assistance relief services from making false or misleading claims . . . bar[s] the collection of advance fees for these services . . . [and] prohibit[s] anyone from providing

substantial assistance or support to another they know or consciously avoid knowing is engaged in a violation of the Rule . . . ." 75 Fed. Reg. 75,092, at 75,092 (Dec. 1, 2010) (Summary).

The attorney general for Colorado may enforce the MARS Rule and obtain injunctive relief under Section 626(b) of the 2009 Omnibus Appropriations Act. 16 C.F.R. § 322.10. Under Section 626(b) a state attorney general who "has reason to believe that an interest of the residents of the State has been or is threatened or adversely affected by the engagement of any person . . . in practices that violate" the MARS Rule, may bring a civil action to enjoin that practice.

The United States and the State of Colorado bring this action to protect the public, and to secure the proceeds of the fraud for eventual return to the victims. Absent the requested injunctive relief, the public will continue to be victimized by Defendants, and ill-gotten gains will be dissipated and become unrecoverable. The requested relief is calibrated to protect Defendants' past and would-be victims, and includes the freezing of bank accounts controlled by Defendants and into which fraud-tainted money has been deposited.

In particular, Plaintiffs immediately seek a temporary restraining order *ex parte*, based on the pleadings and declarations presented to the Court, because Defendants' fraud should be immediately halted and because premature notice to Defendants would provide an opportunity for Defendants to dissipate, transfer or conceal their ill-gotten gains, and thereby undermine the ability of the Court to protect the public to the extent now possible. Other courts have granted similar *ex parte* temporary restraining orders to stop ongoing fraud. *See, e.g., United States v. DBB, Inc.*, 180 F.3d 1277 (11th Cir. 1999) (court granted *ex parte* TRO to prevent dissipation of assets); *United States v. Petters*, 2011 U.S. Dist. Lexis 13357 (D. Minn., Jan. 25, 2011) (court granted *ex parte* TRO freezing all assets belonging to defendants accused of committing mail, wire, and banking fraud in order to preserve assets for restitution and forfeiture). The need for *ex parte*

relief is particularly keen here, where the individual directing the scheme has a history of violating the law for his own financial gain. A proposed temporary restraining order is attached to this filing.

FACTUAL BACKGROUND

The fraudulent scheme is described in the Complaint and exhibits. In summary, Defendants solicit homeowners to convey title to their homes to Bella Homes for no consideration and to enter into purported lease agreements under which the homeowners, instead of making their mortgage payments, pay Bella Homes monthly "rent." (Complaint at ¶ 6). To entice homeowners into this arrangement, Defendants make or cause to be made numerous material misrepresentations to homeowners to convey the false and fraudulent impression that:

- Bella Homes will stop any foreclosure on the home;
- Bella Homes will purchase or otherwise settle the existing mortgage on the home from the lender;
- federal law provides the homeowner the right to remain in the home for the duration of the lease with Bella Homes; and
- the homeowner will have an option to repurchase the home in three years from Bella Homes for significantly less than the amount currently owed on the mortgage.

(*Id*. at ¶¶ 7, 8). Defendants make these false representations on the Bella Homes website and in solicitations and letters sent to interested homeowners. (*Id*. at ¶¶ 31-40).

Contrary to Bella Homes' representations and promises, Bella Homes admitted in response to a subpoena that it has not purchased any mortgages and lacks the financial capacity to purchase mortgages. (*Id*. at ¶¶ 60-64). Because neither Bella Homes nor the homeowner pays the

mortgage, the home is inevitably foreclosed upon and the homeowner is ultimately evicted. (*Id*. at ¶ 65). Bella Homes is not successful in stopping the foreclosure or eviction, and the homeowner is not protected by any law to remain in the home for the lease term. (*Id*. at ¶¶ 65-82). In the end, Bella Homes merely collects "rent" from the homeowner while providing no meaningful assistance. (*Id*. at ¶ 11).

The fraudulent scheme is summarized below.

A. Bella Homes, LLC

Bella Homes is a limited liability company organized and existing under the laws of the state of Delaware since March 29, 2010. (Declaration of Investigator Shelly-Jean Sartor, Exh. 1, at ¶ 3). Bella Homes is also registered as a foreign entity transacting business in the state of Colorado since April 15, 2011. (Exh. 1, at ¶ 3).

Bella Homes offers homeowners a program which it claims is designed to help them "remain in their homes and secure them for long time use." (Exh. 1, at ¶ 10). Under the Bella Homes program, the homeowner transfers title to the home to Bella Homes, enters into a lease agreement to "rent" the home from Bella Homes, and pays Bella Homes an upfront fee and monthly "rent" payments, which are significantly less than the homeowner's mortgage payment. (Exh. 1, at ¶ 5). In order to entice homeowners into the program, Bella Homes falsely claims that, under the program, the homeowner will avoid foreclosure, Bella Homes will purchase the homeowner's mortgage from the lender, federal law provides the homeowner the right to remain in the home during the lease term, and the homeowner will have the option to repurchase the home at the end of the lease term. (Exh. 1, at ¶¶ 5, 7, 12, 20).

Bella Homes has recruited representatives across the nation to solicit homeowners to sign up for the Bella Homes program. (Exh. 1, at ¶ 25). At least five individuals in Colorado signed

up to become Bella Homes representatives. (Exh. 1, at ¶ 26). Bella Homes promises to pay the representative a commission for each homeowner that the representative signs up to the program. (Exh. 1, at ¶ 27). In order to recruit representatives, Bella Homes has posted numerous webinars on the Internet that describe the Bella Homes program and the opportunity to become a representative. (Exh. 1, at ¶ 28). Bella Homes CEO Defendant Mark Diamond and in-house counsel Defendant Michael Terrell have both appeared in webinars to present information on the Bella Homes program. (Exh. 1, at ¶ 28). Bella Homes has hundreds of representatives across the country. (Exh. 1, at ¶ 26).

B. Bella Homes conveys the false impression that it will provide distressed homeowners foreclosure relief and an opportunity to remain in their homes.

Bella Homes makes numerous material misrepresentations to homeowners to falsely convey the impression that it will provide foreclosure relief and an opportunity to remain in their homes. Bella Homes makes these misrepresentations through its website, a solicitation titled "Why Bella Homes?", and a form "pre-approval" letter that it sends to interested homeowners.

1. The Bella Homes website: false representations about purchasing mortgages, avoiding foreclosure, and the right to remain in the home

Bella Homes maintains a website, http://bellahomesllc.net/, which describes the Bella Homes program. (Exh. 1, at ¶ 8). According to the website, Bella Homes claims to be "committed to helping troubled homeowners remain in their homes and secure them for long time use." (Exh. 1, at ¶ 10, and Attach.1, 2). As set forth below, the Bella Homes website communicates numerous representations and promises about the Bella Homes program.

a. Overview of the Bella Homes Program

According to the homepage of the website, Bella Homes helps troubled homeowners by "purchasing" their home, leasing it back to them for a period of three to seven years, then selling

the home back to the homeowner for 90 percent of the appraised value, and crediting 60 percent of the "rent" paid during the lease to the repurchase price. (Exh. 1 at ¶ 12 and Attach. 1, 2). Specifically, the homepage of the website provides the following:

> Bella Homes, LLC is the result of a collaboration of some of the best legal minds in the nation and is founded upon the fundamental principle that families, not banks, should own homes. We proudly stand out as an ethical and legitimate alternative to those less credible companies whose predatory tactics do nothing but exploit the homeowner's financial predicament.
>
> We are committed to helping troubled homeowners remain in their homes and secure them for long time use. Our program, which addresses a number of financial crises, is compliant with both state and federal law, is endorsed by the legal community and is highlighted by the following:
>
> •We purchase homes from troubled homeowners whose homes are upside down with little to no equity[.]
>
> •For qualified homeowners, we will purchase their home from them for the amount of the first mortgage and second mortgage and other liens and then lease their home back to them for a period of three to seven years.
>
> •This lease will include an Option Memorandum, granting the homeowners an exclusive option to repurchase their home.
>
> •Our goal, after we purchase a home or commercial property, is to purchase the underlying first mortgage on said property from the mortgage company or bank at a discount. If we are unsuccessful in doing so, we will conduct a forensic audit of the mortgage to determine if the mortgage is illegal. If that is, indeed, the case, we will then file a lawsuit against the lender to prevent them from proceeding with foreclosure.
>
> •Once we successfully purchase the mortgage from the lender, we will, at the end of their lease, sell the home back to them at 90% of the fair market value at that time and credit them at closing for 60% of the rent paid. If they are unable to obtain a mortgage, we will also provide them with owner financing through one of our subsidiaries or affiliates at the time they exercise their exclusive option to repurchase the home. Based on the foregoing,

> the homeowners' new monthly payment and mortgage balance will ultimately be 40% to 60% lower than their current monthly payment and principal balance.
>
> •By the end of the lease, if we are unsuccessful in purchasing the mortgage from the lender, we will then deed the property back to the party that we purchased the home from.

(Exh. 1, at ¶ 12 and Attach. 2) (emphasis added).

None of these representations is true because Bella Homes itself admits (in response to a subpoena request) that it has not purchased any mortgage that would allow the homeowner to take advantage of any of these claimed benefits. (Exh. 1 at ¶ 32). Rather, the homeowner merely pays Bella Homes "rent" until they realize the scam or are evicted.

b. Representations about purchasing the homeowner's mortgage

The website contains many representations that Bella Homes will purchase the homeowner's mortgage. The homepage of the website represents that Bella Homes' "goal … is to purchase the underlying first mortgage on [the homeowner's] property from the mortgage company or bank at a discount." *See* http://www.bellahomesllc.net/ (viewed on January 10, 2012). Until recently, the homepage of the website also played a video introduction which stated, "We will purchase or settle your mortgage from your current lender." (Exh. 1, at ¶ 11).

In addition, the website contains an "About Us" link which plays a video segment that contains the following representations that Bella Homes purchases mortgages:

> Typically, we acquire mortgages at well below market value then provide options to homeowners including repurchase at an attractive and workable price. And, through it all, we provide those homeowners with unparalleled rights and protections and peace of mind.

(Exh. 1, at ¶ 13, Attach. 2).

The website also contains a "Q&A" link which lists "Frequently Asked Questions." This

page displays the following representations that Bella Homes purchases mortgages:

> Bella Homes' objective is to purchase the mortgage from the lender at a discount.
>
> *How long does it take from the date I sell my home to Bella Homes, to purchase or payoff the underlying mortgage on the property?* Each case is different, however this can take anywhere from six months to thirty months.
>
> *Does Bella Homes have examples where the attorney has successfully negotiated with a major bank?* Yes, however attorneys will not discuss other clients negotiations, as that would be unethical.

(Exh. 1, at ¶ 14, Attach. 2).

c. Representation about avoiding foreclosure

The Bella Homes website also represented that a homeowner who enters the Bella Homes program will avoid foreclosure. Until recently, a video introduction that played on the homepage of the website promised that under the Bella Homes program, "You'll avoid foreclosure." (Exh. 1, at ¶ 11).

d. Representations about the right to remain in the home for the duration of the lease

The Bella Homes website also contains several representations that, under the Bella Homes program, the homeowner will have the right to remain in their home for the duration of the lease agreement with Bella Homes, which is three to seven years. To this end, the "Q&A" link contains the following statement which claims that a federal law will protect the homeowner from eviction during the duration of the lease with Bella Homes:

> *What is the Foreclosure Act of 2009?* This Act protects tenants from eviction after a foreclosure on the property they are renting for the entire term of the lease. However this law does not allow for the homeowner to deed their home over to a friend or family member and then lease it back from that person. In this case the bank would

> likely be able to evict. The sale must be a Bona Fide sale to a real company like Bella Homes, LLC.

(Exh. 1, at ¶ 15, Attach. 2, FAQ no. 52).

The above "Q&A" link also contains a link to a video segment in which the "Senior Corporate Attorney for Bella Homes," Defendant Michael Terrell, explains:

> The Protecting Tenants at Foreclosure Act of 2009 is a federal statute that provides protection for tenants who are living in houses that have been or are being foreclosed. And, the critical aspect of this federal statute, for purposes of our clients, is that when they sign a lease with Bella Homes, going forward, if the lender is eventually able to foreclose against the property, they will still be protected under the terms of their lease agreement.

(Exh. 1, at ¶ 15, Attach. 2).

In addition, the website's homepage claims that, "[b]y participating in our program, you can enjoy every benefit and safeguard that our program has to offer, all at no cost to you, including the following:

> - In general, if there is a foreclosure of any dwelling or residential real property, any bank or entity taking over the property must do so subject to any existing lease that involves a 'bona fide tenant' operating under a 'bona fide lease.' This means that a lease meeting the qualifications of the ACT will survive foreclosure and be enforceable for the remainder of the lease term."

(Exh. 1, at ¶ 16, Attach. 2).

2. <u>"Why Bella Homes" solicitation: false representations about avoiding foreclosure and the ability to repurchase the home</u>

Bella Homes typically sends homeowners who might be interested in the program a solicitation titled "Why Bella Homes?". (Exh. 1, at ¶ 19, Attach. 4). This solicitation contains additional false representations about the Bella Homes program, including representations about avoiding foreclosure and the ability to repurchase the home. (Exh. 1, at ¶ 20, Attach. 4).

Specifically, the solicitation claims that the benefits to the homeowner under the Bella Homes program include:

- No foreclosure on credit report
- No deficiency judgment (by mortgage company(ies))
- Mortgage forgiveness (when Bella Homes purchases the mortgage)
- Repurchase property at lower amount than current mortgage balance
- In most cases when home owner exercises their right to repurchase, Bella Homes will offer owner financing

(Exh. 1, at ¶ 20, Attach. 4).

3. Pre-approval letter: false representations about purchasing the mortgage and the right to remain in the home

Bella Homes sends a form "pre-approval letter" to homeowners who are interested in the Bella Homes program. (Exh. 1, at ¶ 21, Attach. 5). The pre-approval letter contains false representations about Bella Homes' intention to purchase the mortgage from the homeowner's lender and the homeowner's right to remain in their home for the duration of the lease with Bella Homes. (Exh. 1, at ¶ 21, Attach. 5). The pre-approval letter states that Bella Homes' "objective is to help you keep your home," and that the "temporary transition from homeowner to tenant … serves only to place [Bella Homes] in the strongest possible negotiating position with your lender so that [Bella Homes] may purchase or otherwise settle your mortgage as quickly as possible." (Exh. 1, at ¶ 22, Attach. 5).

In the letter, Bella Homes also makes representations about the right to remain in the home for the duration of the lease with Bella Homes. The pre-approval letter states:

> Under our program, you will have the option of a three, five or seven-year lease. A seven-year lease may seem excessive at first but the safeguards it delivers are formidable: in the unlikely event that Bella Homes is unable to purchase or otherwise settle your mortgage and your property proceeds to foreclosure (rest assured,

> this has not happened to date) your lender will be legally bound under a new federal statute to honor the terms of the lease in effect at that time. This means that should your lender initiate foreclosure proceedings, they will be barred from removing you from your home until the term of your lease expires. Again, we have yet to encounter any such circumstances but we believe in being prepared for all possible scenarios.

(Exh. 1, at ¶ 23, Attach. 5) (emphasis added).

Finally, in the pre-approval letter, Bella Homes encourages the homeowner to "visit our website at www.bellahomesllc.net where you will find our mission statement, client testimonials and our most frequently asked questions." (Exh. 1, at ¶ 24, Attach. 5).

C. Contrary to its numerous representations, Bella Homes has not purchased mortgages and homeowners who have paid Bella Homes thousands of dollars are being foreclosed upon and losing their homes.

Despite being in operation for nearly two years, entering into agreements with over 450 homeowners, and promising each homeowner that it will "purchase or settle [their] mortgage from [their] current lender," Bella Homes has admitted in response to a subpoena that it has not purchased a single mortgage. (Exh. 1, at ¶ 32). In fact, Bella Homes does not have the capital or funding to purchase homeowners' mortgages. (Exh. 1, at ¶ 32). There have been at least two instances in which the lender offered to sell the mortgage at approximately one-third of the home's original value to Bella Homes, but Bella Homes rejected those offers. (Declaration of Cyndee Rae Estrada, Exh. 2, at ¶ 19).

Despite the representations and promises made by Bella Homes that the homeowner will avoid foreclosure and have the right to remain in their home, homeowners who have signed up for the program, and paid thousands of dollars to Bella Homes, are nonetheless being foreclosed upon and losing their homes. The following are some examples of homeowners in Colorado who signed up for the Bella Homes program, paid Bella Homes thousands of dollars in reliance on the

representations that they would avoid foreclosure and have the right to remain in their homes, but instead were foreclosed upon and lost their homes. In the end, these homeowners received no meaningful assistance from Bella Homes despite paying Bella Homes substantial sums of money.

1. Homeowner A.B. and Husband

A.B. and her husband, both small business owners, owned a home in Adams County, Colorado. (Declaration of A.B. and husband, Exhibit 3, at ¶ 1). Because of the economic downturn, they became delinquent on their mortgage payments. (Exh. 3, at ¶ 2). On February 3, 2011, Fannie Mae commenced foreclosure proceedings on their home. (Exh. 3, at ¶ 2).

In April 2011, they received a mailer from a Bella Homes representative entitled "Do you want to stay in your home?". (Exh. 3, at ¶ 3). The mailer invited them to contact the representative to learn more about a program that "will keep you in your home" and earn "more than 10% equity in your home– no matter what the market does." (Exh. 3, at ¶ 3 and Attach. A) (emphasis in original). A.B. and her husband met with the Bella Homes' representative, who explained the Bella Homes program. (Exh. 3, at ¶ 4). The representative explained that, in exchange for transfer of title and the execution of a lease agreement, and payment of "rent," Bella Homes would negotiate or purchase their mortgage, prevent foreclosure, and allow them to stay in their home for the duration of the lease period. (Exh. 3, at ¶ 4). A.B. and her husband provided their financial information in order for Bella Homes to determine whether they qualified for the program. (Exh. 3, at ¶ 4).

On April 21, 2011, A.B. received the Bella Homes pre-approval letter, which is described *supra* at pages 12-13. (Exh. 3, at ¶ 5 and Attach. B). Bella Homes enclosed two additional documents with the pre-approval letter: a Pre-Sales Closing Agreement and the "Why Bella Homes?" flier, which is described *supra* at pages 11-12. (Exh. 3, at ¶ 7 and Attach. C, D). The

Pre-Sales Closing Agreement set forth the terms of Bella Homes' purchase of the home. (Exh. 3, at ¶ 7 and Attach. D). The Pre-Sales Closing Agreement provided that Bella Homes will purchase the home for $10.00, that Bella Homes "intends to arrange for a purchase or settlement of the existing first mortgage and second mortgage loan on the Property," and that Bella Homes will lease the home back to A.B. for a term of seven years for a monthly "rent" starting at $1,385 per month. (Exh. 3, at Attach. D). The monthly "rent" amount was significantly less than their mortgage payment. The agreement further provided that A.B. must pay three months' "rent" in advance at the closing. (Exh. 3, at ¶ 11, Attach. D). The agreement also provided that A.B. "will have the Exclusive Option to purchase the residence at the end of the term of the Lease for 90% of the appraised value." (Exh. 3, at ¶ 7, Attach. D). Finally, the agreement provided that Bella Homes "will engage its legal team to protect its interests and conduct a forensic audit of said mortgage and thereafter file suit against the mortgage company. The litigation process is 3-36 months. [Bella Homes] will be responsible for all legal fees in this regard." (Attach D. to Exh. 3).

The "Why Bella Homes?" flier represented that, as part of the "future projected financial benefits" of the program, A.B. would have $66,046 in equity upon repurchase of the home in 36 months. (Exh. 3 at Attach. C). The flier and other documents claimed that A.B. would receive toward the repurchase price 60 percent credit for the "rent" paid to Bella Homes. (Exh. 3 at Attach. C).

A.B. received another letter in the mail from Bella Homes, dated May 5, 2011, containing the signature block of Defendant Michael Terrell. (Exh. 3, at ¶ 8). The May 5, 2011 letter congratulated her on being "approved by the Bella Homes' Board of Directors to participate in one of our programs that will allow you and your family to stay in your home." (Exh. 3, at ¶ 8 and

Attach. E). The letter informed her that the "closing date" had been scheduled, that she needed to send copies of her "mortgage documents" in order to have a forensic audit conducted, and that the "findings will be utilized from the review to assist [Bella Homes] in purchasing your mortgage from your lender." (Exh. 3 at Attach. E). The letter also warned that "if you should not close the transaction according to the terms of the Pre-Sales Closing Agreement signed on April 29, 1011 then you will be responsible for reimbursing Bella Homes, LLC all expenses including legal fees … and commission incurred from the date of the executed agreement." (Exh. 3 at Attach. E).

A.B. and her husband completed a "closing" with Bella Homes on May 5, 2011, and signed a deed transferring title of their home to Bella Homes. (Exh. 3, at ¶ 10 and Attach. F). They also signed a seven-year lease agreement to "rent" the home from Bella Homes, and an option agreement that purported to grant them the exclusive option to repurchase the home from Bella Homes at the end of three years. (Exh. 3, at ¶ 10 and Attach. G, H). They took these actions in reliance upon the representations made by Bella Homes that they would avoid foreclosure and have the right to remain in their home for the duration of their lease. (Exh. 3, at ¶ 9). Bella Homes required that they pay $6,110.29 in advance fees at the closing. (Exh. 3, at ¶ 11). Because they did not have enough money, Bella Homes' director of acquisitions, Defendant David Delpiano, approved a payment plan. (Exh. 3, at ¶ 11).

Bella Homes did not pay any money for the transfer of title, and Bella Homes did not pay the mortgage, the taxes, or the insurance on the home. (Exh. 3, at ¶ 10). Between May 2011 and July 2011, A.B. and her husband paid Bella Homes over $7,000 in advance fees and "rent." (Exh. 3, at ¶¶ 1, 12). Despite paying Bella Homes over $7,000, their home was sold on or about June 14, 2011 at a foreclosure sale. (Exh. 3, at ¶ 13). Bella Homes took no action to stop the foreclosure and made no attempt to purchase the mortgage. (Exh. 3, at ¶ 14).

On July 18, 2011, the lender started an eviction proceeding. (Exh. 3, at ¶ 15). A.B. and her husband were again reassured by Bella Homes' in-house counsel, Defendant Terrell, that a federal law protected them from eviction and that Bella Homes had a 90% success rate in buying mortgages. (Exh. 3, at ¶ 15). But the attorney retained by Bella Homes did not raise the federal Protecting Tenants at Foreclosure Act as a defense to the eviction proceeding, because, as the mortgagor, A.B. and her husband did not qualify for the Act's protections. (Exh. 3, at ¶ 16).

Bella Homes also refused to post the bond payment that was required by the court in order to challenge the eviction proceeding. (Exh. 3, at ¶ 18). Because A.B. and her husband could not afford to post the requisite bond payment, they ultimately agreed with the lender to vacate the home on August 2, 2011—despite paying Bella Homes thousands of dollars. (Exh. 3, at ¶ 19).

2. Homeowner B.C.

B.C. owned a home in Highlands Ranch, Colorado. (Declaration of B.C., Exhibit 4, at ¶ 1). He has been employed by the same company for 15 years, but after experiencing a reduction in income in 2010, he began having difficulty paying his mortgage. (Exh. 4, at ¶ 2). His lender initiated a foreclosure proceeding on or about January 27, 2011. (Exh. 4, at ¶ 3).

In February 2011, B.C. received a solicitation in the mail from a Bella Homes' representative. (Exh. 4, at ¶ 4). He contacted the representative, who explained the Bella Homes program. (*Id*.) He also viewed Bella Homes' website to learn more about the program. (Exh. 4, at ¶ 5).

On or about March 8, 2011, B.C. received the Bella Homes' pre-approval letter.[1] (Exh. 4, at ¶ 6 and Attach. A). Enclosed with the pre-approval letter was a flier entitled "Why Bella

1 The "pre-approval letter" is discussed *supra* at pages 12-13.

Homes?".[2] (Exh. 4, at ¶ 8 and Attach. B). The "Why Bella Homes?" flier included the "future projected financial benefits" of the program, claiming that upon repurchase of the home in 36 months, B.C. would have $130,280 in equity. (Exh. 4, at Attach. B).

Based upon the representations in the Bella Homes' letters, as well as the information on the website, B.C. signed up for the program. (Exh. 4, at ¶¶ 5, 9). He completed a "closing" on April 1, 2011, wherein he signed a deed transferring title to Bella Homes for no consideration. (Exh. 4, at ¶ 10 and Attach. C). Concurrently, he signed a three-year lease agreement to "rent" the home from Bella Homes for a monthly "rental" payment of $2,500, which was significantly less than his mortgage payment. (Exh. 4, at ¶ 10 and Attach. D). He also signed an option agreement that purported to grant him the exclusive option to repurchase the home from Bella Homes at the end of three years. (Exh. 4, at ¶ 10 and Attach. E). Bella Homes required that B.C. pay $8,550 in advance fees at the closing, which he did. (Exh. 4, at ¶ 11).

Between April 2011 and June 2011, B.C. paid Bella Homes over $11,000 in "rent." (Exh. 4, at ¶ 11). Yet, his home was sold on or about May 18, 2011 at a foreclosure sale. (Exh. 4, at ¶ 12). Bella Homes took no action to stop the foreclosure and made no attempt to purchase the mortgage. (Exh. 4, at ¶¶ 12-13).

On June 13, 2011, the new owner initiated an eviction proceeding. (Exh. 4, at ¶ 14). Bella Homes retained a local attorney to file a legal challenge to the eviction. (Exh. 4, at ¶¶ 18-19). However, the court required a $6,400 bond in order to challenge the eviction. (Exh. 4, at ¶ 19). Bella Homes refused to post the bond payment, and B.C. decided to post the bond himself in order to continue with the legal challenge. (Exh. 4, at ¶ 19). But B.C. realized that the situation was futile and reached a settlement with the new owner to move out of his longtime

2 The "Why Bella Homes?" solicitation is discussed *supra* at pages 11-12.

home. (Exh. 4, at ¶ 20).

3. Homeowner C.D.

C.D. owned a home in Douglas County, Colorado. (Civil investigative demand hearing of C.D., Exhibit 5, at 3:15-16). He lived in the home for over 19 years with his wife, and raised his three children in the home. (Exh. 5, at 42:8-17). C.D. owned his own franchise stores in the tire industry. (Exh. 5, at 41:11-18). When his business became unprofitable, he fell behind on his mortgage payments and his lender initiated foreclosure proceedings on or about February 16, 2011. (Exh. 5, at 28:17-22; 41:23-42:3).

In March 2011, C.D. received a solicitation in the mail from a Bella Homes' representative. (Exh. 5, at 4:22-5:3). In response, he contacted the representative, who explained the Bella Homes program. (Exh. 5, at 5:1-3; 43:4-20; 45:20-23). He also reviewed the Bella Homes website to learn more about the program. (Exh. 5, at 46:2-7).

On or about March 8, 2011, C.D. received the Bella Homes' pre-approval letter.[3] (Exh. 5, at Attach. A). Enclosed with the pre-approval letter was a flier entitled "Why Bella Homes?".[4] (Exh. 5, at Attach. B). The "Why Bella Homes?" flier included the "future projected financial benefits" of the program, claiming that upon repurchase of the home in 36 months, C.D. would have $117,641 in equity. (Exh. 5, at Attach. B).

Based upon the information he received from Bella Homes, C.D. decided to sign up for the Bella Homes program. (Exh. 5, at 29:13-18). He believed that by signing up he would pay Bella Homes a monthly "rental" amount that would be less than his mortgage payment, that Bella Homes would purchase his mortgage from his lender, that he would have an opportunity to

3 The pre-approval letter is discussed *supra* at pages 12-12.
4 The "Why Bella Homes?" solicitation is discussed *supra* at pages 11-12.

repurchase his home from Bella Homes in the future, that 60 percent of his "rent" payments would be applied to his future repurchase of the home, and that he would be guaranteed the right to stay in his home. (Exh. 5, at 29:19-30:8; 35:3-15; 53:11-54:4).

C.D. completed a "closing" on April 28, 2011, wherein he signed a deed transferring title to Bella Homes for no consideration. (Exh. 5, at Attach. D). He also signed a three-year lease agreement to "rent" the home from Bella Homes for a monthly "rental" payment of $2,020, which was approximately $1,300 less than his mortgage payment. (Exh. 5, at 12:19-23; 29:22-23, Attach. E). He also signed an option agreement that purported to grant him the exclusive option to repurchase the home from Bella Homes at the end of three years. (Exh. 5 at Attach. F). Bella Homes required that C.D. pay three months' "rent" upfront at the closing. (Exh. 5, at 13:11-14).

Between April 2011 and August 2011, C.D. paid Bella Homes thousands of dollars in advance fees and "rental" payments. (Exh. 5, at 9:25-10:3). Yet his home was sold on or about December 14, 2011 at a foreclosure sale. (Exh. 5, at Attach. C). Bella Homes took no action to stop the foreclosure sale and made no attempt to purchase the mortgage. (Exh. 5, at 12:13-18; 26:12-16)

C.D. discovered that his home was scheduled for a foreclosure sale only by checking the Douglas County public trustee website. (Exh. 5, at 20:9-17). Bella Homes never contacted or informed C.D. that his home was scheduled for a foreclosure sale. (Exh. 5, at 20:18-20). When C.D. discovered the pending foreclosure sale, he was alarmed that he had not heard anything from Bella Homes. (Exh. 5, at 23:11-18). He immediately called Bella Homes and spoke with Defendant Terrell. (Exh. 5, at 23:11-18; 22:5-9; 24:14-18). Terrell told C.D. that if he filed for bankruptcy, Bella Homes would be able to stay the foreclosure sale and it would give Bella Homes more time to work things out. (Exh. 5, at 21:20-22:20; 25:19-26:2). Following this advice, C.D.

filled out the bankruptcy forms on his own and filed for Chapter 13 bankruptcy in August 2011. (Exh. 5, at 20:23-21:3; 21:15-23). However, about a month later, his bankruptcy petition was dismissed. (Exh. 5, at 21:4-10). Three months later, at a foreclosure sale in December 2011, his lender, Bank of America, purchased the home. (Exh. 5, at Attach. C).

4. Other homeowners

Other homeowners across the nation have likewise received no meaningful assistance from Bella Homes, despite paying Bella Homes thousands of dollars in "rent" and advance fees. The attached declarations at Exhibits 6 through 11 are some additional examples of the victims of the fraud.

D. Bella Homes has collected millions of dollars through its fraud.

Bella Homes, through its scheme, has fraudulently collected approximately $3,000,000 in the form of "rent" and upfront fees from over 450 distressed homeowners nationwide. (Exh. 1, at ¶¶ 30, 31). As the above examples illustrate, homeowners who entered the Bella Homes program have transferred title to their home and paid thousands of dollars to Bella Homes, believing that they will avoid foreclosure and retain the right to remain in their home, only to be foreclosed upon and lose their homes. Bella Homes does not provide anything of value in consideration for taking title to the home and collecting "rent" payments from the homeowner. Instead, it is a fraudulent scheme targeting desperate homeowners with false promises and false representations.

E. Bella Homes' fraudulent scheme is ongoing.

Bella Homes has victimized over 450 homeowners nationwide, including at least five homeowners in Colorado, and its scheme is ongoing. (Exh. 1, at ¶ 30). Bella Homes continues to collect rent from homeowners who have signed up for the program, and continues to sign up additional homeowners, and take title to their property, each month. (Exh. 1 at ¶ 45, Attach. 6).

In fact, Bella Homes has been rapidly expanding its operations, collecting approximately $1,000,000 from homeowners in the last two months of 2011 alone. (Exh. 1, at ¶ 45). Bella Homes continues to solicit additional homeowners through its website and through hundreds of representatives across the country. (Exh. 1, at ¶¶ 8, 26).

F. Various individuals direct and control the operations of Bella Homes.

As set forth below, four individuals direct and control the operations of Bella Homes. Each has taken actions to further the scheme to defraud.

1. Daniel Delpiano

Bella Homes is the brainchild of Daniel Delpiano. (Declaration of Rebecca Monroe, Exhibit 12, at ¶ 4). He came up with the business model of Bella Homes while serving his sentence in federal prison between approximately 2006 and early 2010. (*Id*.) He is on supervised release following his federal conviction in the Middle District of Florida of conspiracy to commit mail fraud, wire fraud, and money laundering. (Exh. 1, at ¶ 35). He also has a federal felony conviction in the District of Massachusetts of conspiracy to commit wire fraud, and a state felony conviction in the Georgia for mortgage fraud and racketeering. (Exh. 1, at ¶ 35).

Daniel Delpiano personally hired and controlled each of the Bella Homes' employees, including the former Vice President of Operations ("VPO"), who worked at Bella Homes from May 2010 until April 2011. (Exh. 12, at ¶¶ 4, 21). The VPO was responsible for running the day-to-day operations of Bella Homes, and reported directly to Daniel Delpiano. (Exh. 12, at ¶¶ 3, 5). According to the former VPO, Daniel Delpiano personally approved each homeowner who was brought into the Bella Homes program, set the amount of "rent" the homeowner would pay, and decided if and when a "forensic audit" would be performed on a homeowner's mortgage. (Exh. 12, at ¶¶ 7, 8, 15). Daniel Delpiano and the former VPO created the "Why Bella Homes?"

solicitation, and Daniel Delpiano worked with attorneys to create the closing documents that are sent to homeowners. (Exh. 12, at ¶ 9).

Daniel Delpiano conceals his involvement with Bella Homes due to his probation status. (Exh. 12, at ¶ 4). He is careful not to use his name in connection with Bella Homes. (Exh. 12, at ¶¶ 4, 5). For example, although he personally hired the former VPO, he did not sign her employment contract. (Exh. 12, at ¶ 5). Although for over a year the Bella Homes employees worked out of Daniel Delpiano's personal residence, he would instruct the employees to leave when his probation officer was scheduled to visit his home. (Exh. 12, at ¶¶ 22, 23). In order to further conceal his involvement with Bella Homes, Daniel Delpiano does not pay himself a salary directly out of the Bella Homes' payroll. (Exh. 12, at ¶ 19). Instead, money is transferred to Diamond & Associates, a company controlled by Defendant Mark Diamond, and Daniel Delpiano draws a salary from Diamond & Associates. (Exh. 12, at ¶ 19).

Much of the "rent" that Bella Homes collects from homeowners is converted to Daniel Delpiano's personal use. (Exh. 12, at ¶¶ 23-27). Money from the Bella Homes' account has been used to pay for the expenses of Daniel Delpiano's personal residence, including utilities, lawn service, pool service, maid service, groceries, and furnishings. (Exh. 12, at ¶ 23). He has used a company debit card to make numerous ATM cash withdrawals from the Bella Homes' bank account and frequently in the amount of $700. (Exh. 12, at ¶ 24; Exh. 1, at ¶ 49). He also has two luxury cars that are paid for by Bella Homes. (Exh. 12, at ¶ 25). In addition, monies from the Bella Homes' account have been used to pay for his personal expenses, including hair implants, gifts for his girlfriends, tanning salons, gambling trips, his daughter's wedding, his legal expenses, and private school tuition for his youngest son. (Exh. 12, at ¶ 26).

2. Mark Diamond

Mark Diamond holds himself out to be the president and chief executive officer of Bella Homes. (Exh. 1, at ¶ 36). He filed the articles of organization for Bella Homes. (Exh. 1, at ¶ 36). He opened the Bella Homes' bank account, started its virtual office in Scottsdale, Arizona, and has signed or otherwise approved employment contracts at Bella Homes. (Exh. 1 at ¶ 36; Exh. 2 at ¶ 4; Exh. 12 at ¶ 5). At least in some cases, he has participated in the decision regarding the amount of "rent" that a homeowner will pay. (Exh. 1 at ¶ 37). He has personally presented information about Bella Homes on the Internet and has communicated with its representatives about the program, including a representative in Colorado. (Exh. 1, at ¶ 18; Declaration of Jim Parker, Exhibit 13, at ¶¶ 2-7). He has frequent phone conversations with Daniel Delpiano concerning Bella Homes. (Exh. 12, at ¶ 5). He has authorized or directed payments from the Bella Homes' bank account to himself and to Daniel Delpiano through his companies Diamond Corporation and/or Diamond & Associates. (Exh. 1, at ¶ 39).

Diamond has directed Bella Homes' employees not to use Daniel Delpiano's name in connection with the company in order to conceal Delpiano's control of and involvement in Bella Homes. (Exh. 2, at ¶ 12). Diamond further actively conceals Delpiano's association with Bella Homes by using his other companies as a conduit to transfer the fraud proceeds to Delpiano. (Exh. 1, at ¶ 39; Exh. 12 at ¶ 19). Diamond and Delpiano have a longstanding relationship that includes a prior business entity that was the subject of one of Delpiano's felony onvictions. (Exh. 1, at ¶ 38).

3. Michael Terrell

Michael Terrell holds himself out to be the in-house counsel for Bella Homes. (Exh. 1, at ¶ 40). He has presented significant information about Bella Homes through the website and

webinars on the Internet intended for representatives and prospective clients nationwide. (Exh. 1, at ¶ 40). He has communicated significantly and repeatedly with homeowners by mail, e-mail, and telephone, including homeowners in Colorado. (Exh. 1, at ¶ 40; Exh. 3, at Attach. E, J; Exh. 4, at Attach. F, G; Exh. 5 at 9:3-16). Through his communications with homeowners, he has personal knowledge that homeowners in the Bella Homes program have experienced a loss of their home to foreclosure and eviction, contrary to the promises made by Bella Homes. (Exh. 1, at ¶ 41). Yet he continues to personally make misrepresentations to homeowners.

4. David Delpiano

David Delpiano, the son of Daniel Delpiano, holds himself out to be the director of acquisitions for Bella Homes. (Exh. 1, at ¶ 42). He serves as the point of contact for Bella Homes' representatives nationwide. (Exh. 1, at ¶ 42; Exh. 13 at ¶¶ 12-14). He is also primarily responsible for developing and maintaining the Bella Homes website. (Exh. 1, at ¶ 42). In conjunction with his father, and sometimes Mark Diamond, he personally approves the amount of "rent" that each homeowner pays to Bella Homes, including homeowners in Colorado. (Exh. 1, at ¶ 42; Exh. 13 at ¶ 13). He has communicated with many homeowners, including homeowners in Colorado, about the Bella Homes program. (Exh. 3, at ¶ 11; Exh. 4, at ¶ 11; Exh. 11, at ¶ 12).

G. The individuals controlling Bella Homes have been spending the proceeds of the fraud.

Most of the money Bella Homes collects from homeowners has been diverted to the individual Defendants for their own personal use. No money has been used to purchase mortgages. (Exh. 1 at ¶ 32). In summary:

- At least $248,000 of the proceeds were issued from Bella Homes' bank account to Diamond Corporation and Diamond & Associates, which are corporations controlled by

Defendant Diamond. (Exh. 1, at ¶ 47, Attach. 7).

- At least $321,000 of the proceeds were issued to or used to pay personal expenses of Defendant Diamond, including more than $277,000 for his American Express bills. (Exh. 1, at ¶ 48, Attach. 7).
- At least $184,000 of the proceeds from the fraud were used by Daniel Delpiano for personal expenses, including $86,180 in ATM cash withdrawals. (Exh. 1, at ¶ 49). In addition, money issued from the Bella Homes' bank account to Diamond Corporation was then used to pay Daniel Delpiano a "salary" of approximately $95,000 last year. (Exh. 1, at ¶ 50).
- At least $92,000 of the proceeds were issued to Defendant David Delpiano. (Exh. 1, at ¶ 51, Attach. 7).
- At least $49,000 of the proceeds were issued to Defendant Terrell. (Exh. 1, at ¶ 52, Attach. 7).
- At least $61,000 of the proceeds were issued to Laura Tabrizipour. (Exh. 1, at ¶ 53, Attach. 7). Laura Tabrizipour holds herself out as the director of quality control for Bella Homes. (Exh. 1, at ¶ 43). She is the girlfriend of David Delpiano, and was hired by Daniel Delpiano to work for Bella Homes. (Exh. 1, at ¶ 43.)

LEGAL ARGUMENT

The United States is entitled to relief under the Fraud Injunction Statute. The supporting declarations establish probable cause to believe that Defendants are engaged in an ongoing scheme to commit mail fraud and wire fraud. This showing is sufficient to support the requested relief, intended to stop the ongoing fraud and protect the public.

The State of Colorado is equally entitled to relief under the FTC's MARS Rule, 16 C.F.R. Part 322, which grants the state attorneys general authority to enforce the MARS Rule and obtain injunctive relief. 16 C.F.R. § 322.10 and Section 626(b) of the 2009 Omnibus Appropriations Act. The supporting declarations likewise establish that Defendants' conduct violates several provisions of the MARS Rule, including the prohibition against mortgage assistance relief providers making false or misleading claims, collecting advance fees, and providing substantial assistance or support to another they know or consciously avoid knowing is engaged in a violation of the MARS Rule.

I. Injunctive Relief Is Warranted Under The Fraud Injunction Statute

Under the Fraud Injunction Statute, the Court should enjoin the fraud and also enjoin alienation of fraud-tainted assets.

A. The Fraud Injunction Statute permits courts to immediately enjoin ongoing fraud and restrain assets.

Congress enacted 18 U.S.C. § 1345 as part of the Comprehensive Crime Control Act of 1984. *See* Pub. L. No. 98-473, § 1205(a), 98 Stat. 1837, 2152 (1984). It explained that it was providing the Attorney General with a tool to protect innocent victims from ongoing fraudulent schemes and to protect the illegally obtained proceeds of those schemes from dissipation. The legislative history to section 1345 explains that it will "allow the Attorney General to put a speedy end to a fraud scheme by seeking an injunction in federal district court whenever he determines he has sufficient evidence of a violation of chapter 63 to initiate such an action. The court is to grant such action as is warranted to prevent a continuing and substantial injury to the class of persons designed to be protected by the criminal statute allegedly being violated." *See* S. Rep. 225, 98th Cong., 2d Sess. 401-02, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3539-40.

Section 1345 does not create a substantive offense. Rather, it provides a *civil* injunction remedy "in any Federal court" to enjoin violations of enumerated statutes, including the mail and wire fraud statutes. Specifically, section 1345 provides, in relevant part:

> (a)(1) If a person is –
>
> (A) violating or about to violate this chapter [18 U.S.C. §§ 1341-1351] …
>
> …
>
> the Attorney General may commence a civil action in any Federal Court to enjoin such violation.
>
> ***
>
> (3) A permanent or temporary injunction or restraining order shall be granted without bond.
>
> (b) The Court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before a final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

18 U.S.C. § 1345(b) (emphasis added).

B. For injunctive relief under section 1345, it is sufficient to show probable cause of a statutory violation.

As noted above, section 1345 is a civil statute, and the legislative history to section 1345 explains that the Attorney General may seek an injunction "whenever he determines he has sufficient evidence of a violation of chapter 63 to initiate such an action." *See* S. Rep. 225, 98th Cong., 2d Sess. 401-02, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3539-40.

In determining what is sufficient evidence in an action under section 1345, courts have generally considered whether there is evidence of a continuing violation, and have not required

any elevated factual showing. A majority of courts have found that an injunction is warranted if the United States establishes "probable cause" to believe that the defendants are engaged in a violation of one or more of the predicate statutes. *See United States v. Smith,* 502 F. Supp. 2d 852 (D. Minn. 2007) (probable cause standard); *United States v. Payment Processing Ctr., LLC.*, 461 F. Supp. 2d 319, 323 (E.D. Pa. 2006) (same); *United States v. Lidahl,* 356 F. Supp. 2d 1289 (S.D. Fla. 2005) (same); *United States v. William Savran & Associates*, 755 F. Supp. 1165 (E.D.N.Y. 1991) (same); *United States v. Belden,* 714 F. Supp. 42, 45-46 (N.D.N.Y. 1987) (same); *United States v. Gupta*, 2011 U.S.Dist. LEXIS 97264 (C.D. Ill. Aug. 30, 2011) (same); *United States v. Jamie,* 2011 U.S. Dist. LEXIS 4678 (S.D. W. Va., Jan. 18, 2011) (same); *United States v. Hobbs,* 2008 U.S. Dist. LEXIS 88200 (S.D. Ill. Oct. 31, 2008) (same).

Courts have reasoned that the probable cause standard is appropriate because probable cause is the standard applicable under the postal detention of mail statute, 39 U.S.C. § 3007, which is the remedy that Congress sought to enhance when it enacted 18 U.S.C. § 1345. *Belden*, 714 F. Supp. at 44-45. *See also United States v. Beamish*, 466 F.2d 804 (3d Cir. 1972) (probable cause standard applies to injunctions sought under § 3007). It would be incongruous to impose a higher standard under § 1345, when Congress wanted to provide a better weapon to protect victims of fraudulent schemes during the often lengthy time required to investigate and prosecute the underlying charges. *See Belden*, 714 F. Supp. at 45 ("it is unlikely that Congress intended to hold the government to a more stringent standard than that of probable cause when relief under § 1345 was sought, since § 1345 was intended to make it easier for the government to obtain preliminary injunctions as a means of terminating fraudulent schemes during the pendency of criminal investigations than had been possible under 39 U.S.C. § 3007").

Other courts have required that the government establish a likelihood of success on the

merits by a preponderance of the evidence. *United States v. Sriram*, 147 F. Supp. 2d. 914, 938 (E.D. Ill. 2001); *see also United States v. Brown*, 988 F.2d 658, 660 (6th Cir. 1993) (imposing traditional standards of civil litigation); *United States v. Hoffman*, 560 F. Supp. 2d 772, 777 (D. Minn. 2008); *United States v. Williams*, 476 F. Supp. 2d 1368, 1374 (M.D. Fla. 2007); *United States v. Barnes*, 912 F. Supp. 1187 (N.D. Iowa 1996); *United States v. Quadro Corp*., 916 F. Supp. 613 (E.D. Tex. 1996).

This distinction – between "probable cause" of a violation, or a likelihood of success on the merits by a preponderance of the evidence -- "may be more apparent than real." *See United States v. Fang*, 937 F. Supp. 1186, 1196-97 (D. Md. 1996). As the court in *Fang* pointed out, the traditional standard for injunctive relief is "reasonable probability" of success on the merits. *Id*. Reasonable probability of ultimate success must mean something less than actual proof by a preponderance of the evidence inasmuch as evidence sufficient to support an injunction may be less than that needed to obtain a verdict at trial. *Id*. at 1197. Moreover, the definition of "reasonable probability" is substantially the same as the definition of probable cause. *Id*. Thus, there may not be any substantive difference between the traditional standard for issuance of an injunction and the probable cause standard embraced by many courts.

C. Irreparable harm need not be shown.

In order to obtain injunctive relief here under 18 U.S.C. § 1345(a), the United States need only show that Defendants are engaged in an ongoing violation of the mail or wire fraud statutes. A showing of irreparable harm is not a necessary element for a § 1345 injunction.

Courts have declined to require a showing of irreparable harm in actions under section 1345, reasoning that such harm is presumed under the statute. For example, in *William Savran*, the court explained that a showing of irreparable harm is not necessary where Congress has, by

specific statutory provision, authorized injunctive relief:

> In other areas where Congress has provided for Governmental enforcement of a statute by way of an injunction, the courts have consistently held that irreparable harm need not be demonstrated, and that so long as the statutory conditions are met, irreparable harm to the public is presumed.

William Savran, 755 F. Supp. at 1179 (citations omitted) (emphasis added). *See also Government of the Virgin Islands v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (3d Cir. 1983) (no need to show irreparable harm where statute intended to protect the public). Likewise, in *United States v. Sriram*, the court found that to obtain an injunction under 18 U.S.C. § 1345, the government did not need to establish irreparable injury. 147 F. Supp. 2d at 937-38.

More generally, courts have found that under section 1345, it is enough to show an ongoing violation, and that Congress did not separately require the United States to meet the other elements for injunctive relief. *Sriram*, 147 F. Supp. 2d at 937-38. Similarly, in *United States v. Fang*, 937 F. Supp. at 1199-1200, the court held that, in the context of the Fraud Injunction Statute, there is no need to establish irreparable harm, inadequacy of the remedy at law, public interest or balance of hardships, as all of these elements are presumed once the government has made its showing on the merits. *Id.*[9]

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9 *See also United States v. Williams*, 476 F. Supp. 2d 1368, 1377 (M.D. Fla. 2007) ("Once illegal activity is clearly demonstrated by a plaintiff under 18. U.S.C. Section 1345, the remaining equitable factors of continuing irreparable injury, the balance of hardships to the parties, and the public interest are presumed to weigh in favor of granting injunctive relief."); *United States v. Livdahl*, 356 F. Supp. 2d 1289, 1290-91 (S.D. Fla. 2005) ("The Court concludes that because [section 1345] expressly authorize[s] injunctive relief, no specific finding of irreparable harm is necessary, no showing of inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a preliminary injunction in this case."); *United States v. Quadro Corp.*, 928 F. Supp. 688, 697 (E.D. Tex. 1996) (under section 1345 the government need not establish actual injury or irreparable harm because it is presumed); *United States v. Barnes*, 912 F. Supp. 1187, 1195 (N.D. Iowa 1996) (same); *United States v. Weingold*, 844 F. Supp. 1560, 1573 (D.N.J. 1994) (proof of irreparable harm is not necessary). *But see United States v. Hoffman*, 560 F. Supp. 2d 772, 776 (D. Minn. 2008) (applying traditional factors,

The Tenth Circuit has not squarely addressed this issue in the context of a section 1345 injunction, but it has recognized the general principle that where an injunction is authorized by statute (as it is here), enforcement of the statute does not require a showing of irreparable harm. *Mical Commun., Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035-36 (10th Cir. 1993) ("When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown.") (quoting *Atchison, Topeka and Santa Fe Railway Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981)). Violation of such statutes is presumed to cause public harm; the government need only establish that defendants have violated the statute and there exists "some cognizable danger of recurrent violation." *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1230-31 (10th Cir. 1997) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

D. The evidence shows that Defendants are engaged in an ongoing mail and wire fraud scheme.

The United States has provided the Court with declarations and sworn testimony establishing that Defendants have engaged in violations of the mail and wire fraud statutes, and that such offenses are ongoing.

1. <u>The mail and fraud statutes are violated when there is either a scheme to defraud or false representations and promises</u>.

The mail and wire fraud statutes criminalize (1) any scheme or artifice to obtain money "by means of false or fraudulent pretenses, representations, or promises," or (2) any "scheme or artifice to defraud," where such a scheme involves the use of the mails or interstate wires. 18 U.S.C. §§

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but noting that where the United States seeks an injunction under section 1345 "the threat of substantial injury to a class of persons for whose protection the government initiates may substitute for the irreparable harm injury").

1341, 1343.

"Although largely overlapping, a scheme to defraud, and a scheme to obtain money by means of false or fraudulent pretenses, representations, or promises, are *separate* offenses." *United States v. Cronic*, 900 F.2d 1511, 1513 (10th Cir. 1990) (emphasis added). *See also United States v. Bonnett*, 877 F.2d 1450, 1454 (10th Cir. 1989) ("The mail and wire fraud statutes make the same distinction as § 1344 between schemes to defraud and schemes to obtain property by false or fraudulent pretenses, representations, and promises.").

A scheme to obtain money by false or fraudulent pretenses can be shown by evidence of statements that were false or fraudulent. "A scheme to obtain money by means of false or fraudulent pretenses, representations, or promises, … focuses on the means by which money was obtained. False or fraudulent pretenses, representations or promises are an essential element of the crime." *Cronic*, 900 F.2d at 1513-14.

Showing a "scheme to defraud," on the other hand, requires conduct designed to deceive, but does not require showing false statements. "The offense of a scheme to defraud focuses on the intended end result, not on whether a false representation was necessary to effect the result. Schemes to defraud, therefore, may come within the scope of the statute even absent an affirmative misrepresentation." *Cronic*, 900 F. 2d at 1513. "A scheme or artifice to defraud connotes a plan or pattern of conduct which is intended to deceive persons of ordinary prudence and comprehension." *United States v. Hanson*, 41 F.3d 580, 583 (10th Cir. 1994) (internal quotations omitted). "A schemer's indifference to the truth of her statements may constitute fraudulent intent, 'and even though a defendant may firmly believe in [her] plan, [her] belief will not justify baseless or reckless representations.'" *Id.* (quoting *United States v. Reddeck*, 22 F.3d 1504, 1507 (10th Cir. 1994)).

Here, the United States has established that Defendants are engaged in a scheme to obtain money by means of false representations or promises and a scheme to defraud.

a. Defendants are engaged in a scheme to obtain money by false representations or promises.

The United States has established that Defendants make false representations and promises in order to obtain money from distressed homeowners. Specifically, Defendants make, or cause to be made, false representations and promises that the homeowner will avoid foreclosure, that Bella Homes will purchase or otherwise settle the mortgage, that federal law guarantees the homeowner the right to remain in the home for the duration of the lease with Bella Homes regardless of any foreclosure sale, and that the homeowner will have an option to repurchase the home from Bella Homes for significantly less than the amount currently owed on the mortgage:

- *The homeowner will avoid foreclosure*

The "Why Bella Homes" solicitation promises homeowners that they will have "No foreclosure on credit report." (Exh. 1, at Attach. 4). Until recently, the video introduction on the Bella Homes website also promised that under the Bella Homes program, "You'll avoid foreclosure." (Exh. 1, at ¶ 11). Thus, at the time that many homeowners signed up with Bella Homes, the website also promised that the homeowner would avoid foreclosure.

But, as evidenced in the attached declarations, this is a false, illusory promise, because Bella Homes is not successful in permanently stopping the foreclosure action. Under the program, because neither the homeowner nor Bella Homes is paying the mortgage, and because Bella Homes does not purchase the mortgage, the foreclosure sale is inevitable. And because the homeowner remains the mortgagor, the foreclosure will ultimately be reported on the homeowner's credit report.

- *Bella Homes will purchase or settle the mortgage*

The homepage of the Bella Homes website claims that Bella Homes' "goal … is to purchase the underlying first mortgage on [the homeowner's] property from the mortgage company or bank at a discount." (Exh. 1, at ¶ 12, Attach. 2). Until recently, the homepage of the website also played a video introduction which promised, "We will purchase or settle your mortgage from your current lender." (Exh. 1, at ¶ 11). The "About Us" link plays a video segment that states, "Typically, we acquire mortgages at well below market value then provide options to homeowners including repurchase at an attractive and workable price." (Exh. 1, at ¶ 13). The "Q&A" link claims that it typically takes "anywhere from six months to thirty months" for "Bella Homes to purchase or payoff the underlying mortgage on the property" and that "Bella Homes [has] examples where the attorney has successfully negotiated with a major bank." (Exh. 1, at ¶ 14, Attach. 2). Finally, the pre-approval letter explains that the Bella Homes program places Bella Homes "in the strongest possible negotiating position with your lender so that [Bella Homes] may purchase or otherwise settle your mortgage as quickly as possible." (Exh. 1, at ¶ 22, Attach. 5). These are false claims and representations because, as Bella Homes itself admits in response to a subpoena, it has not purchased a single mortgage despite being in operation for nearly two years. Moreover, Bella Homes does not have the capital or funding necessary to purchase the mortgages of the hundreds of homeowners who have entered into the program.

- *Federal law guarantees the right to remain in the home as a tenant even if there is a foreclosure on the home.*

The home page of the website claims that, by participating in the Bella Homes program, the homeowner's "lease" with Bella Homes will "survive foreclosure" and that "any bank or entity taking over the property must do so subject to [the] existing lease." (Exh. 1, at ¶ 16, Attach. 2).

Defendant Terrell's video segment on the "Q&A" link claims:

> Protecting Tenants at Foreclosure Act of 2009 is a federal statute that provides protection for tenants who are living in houses that have been or are being foreclosed … and, the critical aspect of this federal statute, for purposes of [Bella Homes] clients, is that when they sign a lease with Bella Homes, going forward, if the lender is eventually able to foreclose against the property, they will still be protected under the terms of their lease agreement.

(Exh. 1, at ¶ 15). In addition, the pre-approval letter claims that the lease with Bella Homes provides "formidable" safeguards, because "in the unlikely event that Bella Homes is unable to purchase or otherwise settle your mortgage and your property proceeds to foreclosure (rest assured, this has not happened to date) your lender will be legally bound under a new federal statute to honor the terms of the lease in effect at the time … [and] will be barred from removing you from your home until the term of your lease expires." (Exh. 1, at ¶ 23, Attach. 5).

These promises are false. Homeowners who enter into the Bella Homes program are not protected by the Protecting Tenants at Foreclosure Act because, under the plain language of the statute, they are not a "bona fide tenant" under a "bona fide lease" as defined in the Act. The Act provides, in relevant part:

> (a) IN GENERAL.-In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to-
>
> …
>
> (2) the rights of any <u>bona fide tenant</u>, as of the date of such notice of foreclosure-
>
> (A) <u>under any bona fide lease entered into before the notice of foreclosure</u> to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will

> occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1), . . .

Pub. L. No. 111–22, § 702(a), 123 Stat. 1660 (2009). (Emphasis added).

Section 702(b) defines a "bona fide lease" as one in which "(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy." (Emphasis added).

Contrary to Bella Homes' representations, homeowners who enter into the program are not a bona fide tenant under section 702(b) of the Act, because the homeowner remains the mortgagor after conveying title to Bella Homes. The Act's protections therefore do not apply to any Bella Homes' client. Furthermore, the lease agreement with Bella Homes is not the result of an arms-length transaction, is for substantially less than fair market rent, and, for many Bella Homes clients, was entered into after the notice of foreclosure–all additional reasons the Act's protections do not apply.

- *The homeowner will have the option to repurchase the home from Bella Homes for significantly less than what is currently owed on the mortgage*

The homepage of the website claims that "once [Bella Homes] successfully purchase[s] the mortgage from the lender, we will, at the end of their lease, sell the home back to them at 90% of the fair market value at that time and credit them at closing for 60% of the rent paid." (Exh. 1, at ¶ 12, Attach. 2). In addition, the "Why Bella Homes?" solicitation claims that the benefits of the Bella Homes program include the ability to "[r]epurchase property at lower amount than current mortgage balance." (Exh. 1, at ¶ 20, Attach. 4). To this end, Bella Homes executes an option agreement with the homeowner which purports to grant the homeowner the exclusive option to

repurchase the home from Bella Homes after paying "rent" to Bella Homes for three years. (Exh. 2, at ¶ 10, Attach. H; Exh. 4, at ¶ 10, Attach. E; Exh. 5, at Attach. F; Exh. 6, at ¶ 8, Attach. F; Exh. 7, at ¶ 6, Attach. G; Exh. 8, at ¶ 6, Attach. E; Exh. 9, at ¶ 4, Attach. B; Exh. 10, at ¶ 7, Attach. E; Exh. 11, at ¶ 7).

These promises that the homeowner has the right to repurchase the home are false and illusory. As explained above, the inevitable outcome of the Bella Homes program is that the homeowner will be foreclosed upon by the lender and evicted. Because Bella Homes never purchases the mortgage on the home, Bella Homes is never in a position to sell the home back to the homeowner. And because the option to repurchase the home is illusory, the homeowner will never receive, as promised, a 60% credit of "rent" payments applied to the repurchase of the home, which is yet another false promise made by Bella Homes.

b. Defendants are also engaged in a scheme to defraud.

More generally, Defendants are clearly engaged in a pattern of conduct which is intended to deceive homeowners of ordinary prudence and comprehension. Through the Bella Homes' website, literature and other mailers, webinars, and communications, Defendants create the false impression that Bella Homes will provide meaningful relief to distressed homeowners, who pay substantial sums of money in the form of "rent" to Bella Homes in reliance upon these representations. Bella Homes is on notice that homeowners who have paid thousands of dollars to Bella Homes have not received the promised outcome and have instead lost their homes to foreclosure and eviction. Nonetheless, Defendants continue to take actions to create the same false impression that the Bella Home program will provide meaningful relief. Defendants' actions demonstrate their intent to deceive distressed homeowners in order to obtain millions of dollars of ill-gotten gains.

2. Defendants are using the mails and wires.

Moreover, the United States has established that Defendants have used, or caused to be used, the mail and interstate wires in furtherance of their scheme to defraud. Specifically, in furtherance of the scheme, Defendants routinely send e-mails and faxes from the Bella Homes office site in Georgia to representatives and homeowners nationwide. (Exh. 4, at ¶¶ 16, 21; Exh. 6, at ¶¶ 5-7, 10, 13-15; Exh. 7, at ¶ 4; Exh. 8, at ¶¶ 12, 14; Exh. 10, at ¶ 10; Exh. 11, at ¶¶ 11-13, 16). Bella Homes also maintains a website which is hosted on a server in Texas and viewed nationwide by Internet users. (Exh. 1, at ¶ 8). Additionally, Defendants mail, and cause representatives to mail, solicitations and other Bella Homes documents to homeowners across the nation. (Exh. 3, at ¶¶ 3, 5, 8; Exh. 4, at ¶¶ 4, 6; Exh. 6, at ¶¶ 4; Exh. 7, at ¶¶ 3, 5, 12; Exh. 8, at ¶ 4; Exh. 9, at ¶ 9; Exh. 10, at ¶ 13; Exh. 11, at ¶¶ 10). Bella Homes also causes homeowners to use the mail to send in monthly "rent" checks. (Exh. 3, at ¶ 12; Exh. 8, at ¶ 8).

E. An injunction is warranted to stop the ongoing fraud and freeze Defendants' assets to prevent ongoing harm to homeowners.

1. Section 1345 authorizes broad relief.

The Fraud Injunction Statute provides broad authority for a court to "enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought." 18 U.S.C. § 1345(c).

In addition, the statute specifically authorizes special remedies -- including the restraint of substitute property -- for certain types of violations. It provides that "[i]f a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title) … or property which is traceable

to such violation, the Attorney General may commence a civil action in Federal court … for a restraining order to prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value." 18 U.S.C. § 1345(2)(B)(i) (emphasis added). A "banking law violation" is defined in section 3322(d) as a "violation of or conspiracy to violate: certain enumerated offenses, including "section 1341 [mail fraud] or 1343 [wire fraud] affecting a financial institution." 18 U.S.C. § 3322(d)(1)(B). The term "financial institution," in turn, is defined in 18 U.S.C. § 20 to include a "mortgage lending business."[10]

Here, Defendants' ongoing mail and wire fraud affects financial institutions--namely, the mortgage lenders that originated, service, or otherwise hold the mortgages of the homeowners who enter into the Bella Homes program. Defendants, through their fraudulent scheme, induce homeowners to pay "rent" to Bella Homes in lieu of making their mortgage payment. Because the inevitable result of Defendants' scheme is foreclosure, the mortgage lender is affected. As such, because the Defendants' ongoing mail and wire fraud is an offense "affecting a financial institution," Defendants are engaged in a "banking law violation" under the Fraud Injunction Statute.

2. An injunction is needed to enjoin the ongoing fraud and prevent serious harm to victims.

An order enjoining the ongoing fraud is warranted. Defendants' fraudulent conduct is not only continuing unabated, but is rapidly expanding. During the period of March 2010 through mid December 2011, Defendants obtained approximately $3,000,000 from over 450 homeowners victimized by the fraudulent scheme. Despite being on notice of the United States' and the State

10 "[T]he term 'mortgage lending business' means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce." 18 U.S.C. § 27.

of Colorado's investigation into their conduct, Defendants have expanded their scheme, obtaining over $1,000,000 in the last two months of 2011 alone.

Defendants continue to solicit distressed homeowners and have expanded their network of representatives to market the scheme. Absent injunctive relief, the victimized homeowners will continue to pay "rent" to Bella Homes and more distressed homeowners will be solicited and snared into the scheme. These homeowners will not only lose thousands of dollars, they will also lose the opportunity to work with their lender or a legitimate mortgage assistance provider to avoid foreclosure. As such, this Court should use its discretion under the Fraud Injunction Statute to "enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing injury to … any class of person or class of persons for whose protection the action is brought." 18 U.S.C. § 1345(b).

3. An injunction temporarily freezing Defendants' assets is needed to prevent dissipation and to ensure that victims can recover.

An injunction is also warranted to provide relief to victims. As set forth above, because Defendants have ill-gotten gains as a result of a banking law violation, the Fraud Injunction Statute provides this Court with the discretion to freeze Defendants' assets to prevent the alienation or dissipation of the fraud proceeds. 18 U.S.C. § 1345(a)(2). In fact, courts have routinely used their discretion under § 1345(b) to freeze assets related to a mail or wire fraud. *See United States v. Brown*, 988 F.2d 658 (6th Cir. 1993) (finding that Congress intended that district courts have the authority to freeze assets that are the fruit of the fraud); *United States v. Quadro Corp.*, 916 F. Supp. 613 (E.D. Tex. 1996) (same); *United States v. Barnes*, 912 F. Supp. 1187 (N.D. Iowa 1996) (freezing of assets was within proper scope of preliminary injunction against mail fraud). Here, the court should order the requested relief, freezing Defendants' assets, because those assets are at

risk of being dissipated or concealed. [12]

Each month, most of the money paid to Bella Homes by virtue of the fraudulent scheme is quickly dissipated for Defendants' personal expenses. To be sure, it is not used to purchase mortgages, which is Bella Homes' purported mission. Large sums of money are also routinely withdrawn as cash from the Bella Homes' account and otherwise transferred into accounts controlled by Mark Diamond and others. Absent an order freezing Defendants' accounts, the Defendants will continue to dissipate, alienate, and conceal the proceeds of the fraud, thus depriving the victims of Defendants' scheme any chance of meaningful restitution.

The Court also should freeze the assets of the Relief Defendant, Laura Tabrizipour, in the amount of the fraud-tainted proceeds that she has received. Federal courts regularly permit the government to sue nominal defendants in order to recover fraud proceeds. "[A]mple authority supports the proposition that the broad equitable powers of the federal courts can be employed to recover ill-gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong." *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998). A "nominal defendant" is a person who: "(1) has received ill-gotten funds; and (2) does not have a legitimate claims to those funds." *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998).

Here, the Relief Defendant, Laura Tabrizipour, is an employee of Bella Homes (the director of quality control) and the girlfriend of Defendant David Delpiano, and has received at least $61,000 of the fraud-tainted proceeds. Because she has no legitimate claim to these fraud-tainted funds, the court should freeze her assets in an equivalent amount in order to further

12 Pursuant to Fed. R. Civ. P. 65(b)(4), Defendants will have an opportunity to request a modification of the asset freeze order to allow for funds reasonable and necessary for living expenses and legal fees.

protect the victims of the fraud. *See SEC v. Antar*, 831 F. Supp. 380, 402-03 (D.N.J. 1993) ("[A]s between the [relief] defendants and the victims of the fraud, equity dictates that the rights of the victims should control.").

F. Entry of an *ex parte* order is appropriate under the circumstances here.

The Fraud Injunction Statute specifically provides that the Court may enter a restraining order "as is warranted to prevent a continuing and substantial injury to … any person or class of persons for whose protection the action is brought" and to "prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property" that was "obtained as a result of a banking law violation." 18 U.S.C. § 1345 (a)(2)(B)(i), (b). Rule 65(b) provides that a court may enter a temporary restraining order (TRO) without notice to the opposing party where it appears that "immediate and irreparable injury, loss, or damage will result" before the adverse party can be heard in opposition.

Consumer fraud cases like this one fit squarely into the narrow category of situations where *ex parte* relief is not only appropriate but necessary to make possible full and final effective relief. Courts have regularly issued *ex parte* TROs in cases involving foreclosure-rescue schemes. *See* Exh. 14 for examples of *ex parte* TROs in foreclosure-rescue cases.

As set forth in the attached Rule 65(b) declaration, notice to Defendants will impair the ability to provide full and final effective relief to victims, because Defendants have been dissipating and may continue to dissipate assets, depleting funds available to restore victims. If Defendants' fraud is not immediately halted, immediate and irreparable harm will occur, hundreds of homeowners will continue to convey title to their homes to Bella Homes, to pay Bella Homes "rent," and additional homeowners will be snared into the scheme. In cases such as this one, where Defendants' entire business operation is based on fraud, there is a strong likelihood that

Defendants will attempt to dissipate assets and destroy evidence. In fact, the individual Defendants have consistently dissipated the "rent" payments collected by Bella Homes for their personal use. If Defendants are provided notice, they are likely to further dissipate what remains of the fraud proceeds, thus depriving the victims of Defendants' scheme any chance of meaningful relief.

II. Injunctive Relief Is Also Warranted under the Mortgage Assistance Relief Services Rule.

The State of Colorado may enforce the federal MARS Rule by obtaining injunctive relief under Section 626(b) of the 2009 Omnibus Appropriations Act. 16 C.F.R. §322.10. Section 626(b) provides that the attorney general of a state who "has reason to believe that an interest of the residents of the State has been or is threatened or adversely affected" may file an action to "to enjoin that practice . . .; "to enforce compliance with the rule"; [or] "to obtain . . . relief provided under the . . . Federal Trade Commission (FTC) Act. . . ." *See* 2009 Omnibus Appropriations Act, as amended.

Defendants are subject to the MARS Rule as providers of "Mortgage Assistance Relief Service," which is a program that is represented to consumers as a way of:

> (1) Stopping, preventing, or postponing any mortgage or deed of trust foreclosure sale for the consumer's dwelling, any repossession of the consumer's dwelling, or otherwise saving the consumer's dwelling from foreclosure or repossession;
>
> (2) Negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees;
> . . . .

16 C.F.R. § 322.2(i).

Defendants' conduct violates section 322.3(b) of the MARS Rule by misrepresenting to

homeowners the following regarding Bella Homes' services: (1) you can avoid foreclosure by transferring title to Bella Homes and entering into a lease agreement with, and paying "rent" to, Bella Homes; (2) Bella Homes will purchase your mortgage from the lender and allow you to repurchase the home after three years below market value; (3) you can apply 60 percent of the "rent" paid to Bella Homes to the repurchase price; and (4) federal law protects you from eviction by entering into a lease agreement with Bella Homes.

Defendants' conduct violates section 322.3(c) of the MARS Rule by making a representation about the benefits of its mortgage assistance relief service without competent and reliable evidence that substantiates that the representation is true by the following: (1) claiming that lenders will sell a homeowner's mortgage to Bella Homes at a discount; (2) claiming that a forensic audit and legal challenge to the foreclosure increases the likelihood that the lender will sell the mortgage at a discount; (3) that the lease agreement with Bella Homes offers any protection to the homeowner from foreclosure or eviction; (4) that paying Bella Homes thousands of dollars in "rent" could result in avoiding foreclosure and being in a position to repurchase the home at a significant discount; and (5) mortgage payments could be reduced by 40 to 60 percent.

Defendants' conduct violates section 322.5(a) of the MARS Rule by collecting millions of dollars in advance fees from homeowners in the form of "rent." Bella Homes requires homeowners who enter the program to pay in advance the equivalent of three-months "rent" and a monthly "rental" amount for the term of the lease. The lease, however, is a sham that offers no protection from foreclosure or eviction. Section 322.5 allows for the collection of a fee only after the consumer has executed a written agreement between the consumer and the consumer's lender incorporating the offer of mortgage assistance relief the provider obtained from the lender. Because Bella Homes has never obtained such an agreement with a lender, all the fees it has

collected since January 31, 2011 violate federal law.

Each of the individual Defendants' conduct violates section 322.6 of the MARS Rule by providing substantial assistance or support to Bella Homes while knowing or consciously avoid knowing that Bella Homes is engaged in practices violating the MARS Rule. The individual Defendants know, for instance, that homeowners have been foreclosed upon and evicted, despite signing up with, and paying thousands of dollars to, Bella Homes. They also know that Bella Homes has not purchased a single mortgage despite being in operation for nearly two years. They know that the litigation strategy has failed time and again. And they know that Bella Homes lacks the financial capacity to purchase any mortgages. Despite this knowledge, the individual Defendants provide substantial assistance to support the fraudulent scheme.

The Court has the authority to grant preliminary relief under Sections 13(b) and 19(a)-(b) of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 53(b), § 57(a)-(b). *See* Section 626 of the 2009 Omnibus Appropriations Act, as amended; *FTC v. H.N. Singer*, 668 F.2d 1107, 1111 (9th Cir. 1982). The Tenth Circuit has explained that the FTC Act's grant of authority to provide injunctive relief carries with it the full range of equitable remedies . . . ." *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005). This Court may order whatever temporary or preliminary relief is necessary to prevent ongoing consumer injury. *H.N. Singer*, 668 F.2d at 1113; *FTC v. U.S. Oil & Gas Corp*., 748 F.2d 1431, 1432 (11th Cir. 1984) (stating that a court "has the inherent power of a court of equity to grant ancillary relief, including freezing assets.").

Here, the attached declarations demonstrate that Colorado is entitled to temporary and preliminary relief to prohibit the continuation of Defendants' deceptive acts and practices. The FTC Act allows courts to grant preliminary injunctions provided there is a "proper showing that,

weighing the equities and considering the Commission's likelihood of ultimate success, [granting the injunction] would be in the public interest. . . ." *Klay v. United Healthgroup, Inc*., 376 F.3d 1092, 1097 (11th Cir. 2004). The public interest should receive greater weight particularly where the evidence demonstrates that a business is rooted in deception, for a "court of equity is under no duty to protect illegitimate profits or advance business which is conducted [illegally]." *CFTC v. British Am. Commodity Options Corp*., 560 F.2d 135, 143 (2d Cir. 1977) (quoting *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)) (internal quotations omitted).

CONCLUSION

For the foregoing reasons, the United States and the State of Colorado request that the Court issue the attached *ex parte* temporary restraining order to protect the public by stopping Defendants' ongoing fraudulent conduct and prevent the dissipation of the proceeds of the fraud.

Respectfully submitted this 14th day of February, 2012,

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